93-628

No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM MINEER ..... PETITIONER

versus

FLEMING COUNTY, KENTUCKY; FLEMING COUNTY FISCAL COURT; JEWELL CALL, Fleming County Judge/Executive, in his official and individual capacity; and the FLEMING COUNTY FISCAL COURT MEMBERS, Gary C. Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson, and L.C. Cord, in their official and individual capacities ..... RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a County Judge Executive is entitled to qualified immunity in an action under 42 U.S.C. Section 1983, based upon a denial of procedural due process under the 14th Amendment when he unlawfully discharged for political reasons a county road foreman who had a clearly established property right to continued employment without following the pretermination process as provided by Kentucky statutes?

2. Whether a County Judge Executive is entitled to qualified immunity in a 42 U.S.C. Section 1983 action based upon the 1st Amendment to the United States Constitution when in violation of clearly established law he terminated a county road supervisor for politically motivated reasons?

3. Whether the magistrates of a county fiscal court are entitled to qualified immunity in an action under 42 U.S.C. Section 1983, based upon a denial of procedural due process under the 14th Amendment when they unlawfully discharged for political reasons a county road foreman who had a clearly established property right to continued employment without following the pretermination process as provided by Kentucky statutes?

4. Whether the magistrates of a county fiscal court are entitled to qualified immunity in a 42 U.S.C. Section 1983 action based upon the 1st Amendment to the United States Constitution when in violation of clearly established law he terminated a county road supervisor for politically motivated reasons?

LIST OF PARTIES

The Petitioner is William Mineer. The Respondents are Fleming County, Kentucky; Fleming County Fiscal Court; Jewell Call, Fleming County Judge Executive, in his official and individual capacity; and the Fleming County Fiscal Court Members at the time this action was commenced, including Gary C. Harmon, District 1 Magistrate, Andy Cole, District 2 Magistrate, John Sims, District 3 Magistrate, Ronnie Carpenter, District 4 Magistrate, William Thompson, District 5 Magistrate, and L.C. Cord, District 6 Magistrate, all in their official and individual capacities .

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IN THE

SUPREME COURT OF THE UNITED STATES

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WILLIAM MINEER ..... PETITIONERS

versus

FLEMING COUNTY, ET. AL. ..... RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, William Mineer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 3, 1993.

OPINIONS BELOW

The first opinion and order of the United States Court of Appeals for the Sixth Circuit, *Mineer v Call*, Sixth Circuit Number 92-5368, attached hereto as Appendix "A", was entered on May 4th, 1993. Pursuant to Sixth Circuit Rule 24, it was not recommended for full text publication. The final clarifying opinion and order of the United States Court of Appeals for the Sixth Circuit *In Re: Jewell Call*, Sixth Circuit number 93-6046, attached hereto as Appendix "B", was entered on

September 3rd, 1993. It is not reported in any publication.

The Memorandum Opinion and Order of the United States District Court, Eastern District of Kentucky, Lexington Division, Civil Action 91-4, *Mineer v Fleming County, et. al.*, attached hereto as Appendix "C", was entered on March 4th, 1992. It is not reported in publication.

JURISDICTION

The final opinion and order of the United States Court of Appeals for the Sixth Circuit was entered on September 3, 1993. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States is involved insofar as it provides:

> Congress shall make no law... abridging the freedom of speech...

The Fourteenth Amendment to the United States Constitution is involved insofar as it provides:

> No State shall deprive any person of life, liberty, or property without due process of law...

Title 42 U.S.C. Section 1983, is involved insofar as it provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any

State...subjects or causes to be subjected any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law.

The Kentucky Revised Statutes are involved in the following pertinent parts:

K.R.S. 179.020. County Road Engineer or Supervisor

"(1) The County Judge/Executive of each county, with the consent of the fiscal court, may employ a county road engineer. Any person so employed shall be either a civil or highway engineer licensed in accordance with KRS Chapter 322..."

(2) if the fiscal court does not provide for a county road engineer, the duties of the county road engineer...shall be performed by a County Road Supervisor, who shall be employed by the County Judge/Executive with the consent of the fiscal court and who may be removed in the same manner provided for county road engineers. No person shall be employed County Road Supervisor unless he meets the following requirements:

(a) he has at least three years practical road building experience of a nature satisfactory to examining authorities selected by the Bureau of Highways for the Commonwealth of Kentucky, and

(b) he has passed an examination, either oral or written, or both, given by the examining authorities, and has received a certificate of qualification from the authorities.

(7) The period of employment for any county road engineer or county road supervisor shall be two or four years, with the discretion of the fiscal court, beginning with the second Tuesday in January in an even numbered year. Other terms of employment, and the salaries of all persons employed under the provision of this section shall be fixed by the fiscal court."

KRS 179.060 Removal of Engineer—Filling a Vacancy

"(1) The county judge/executive may remove the county engineer, appointed under KRS 179.020, at any time for incompetency, malfeasance, or misfeasance in office upon written charges after a hearing of which 10 days notice shall be given by serving a copy of the charges upon the county engineer. The hearing shall be at the courthouse, in the county seat.

KRS 67.710 Powers and Duties.

"(1) The county judge/executive shall be the chief executive of the county and shall have all the powers and perform all the duties of an executive administrative nature vested in the county. His responsibilities shall include, but are not limited to the following: exercise with the approval of the fiscal court the authority to appoint, supervisor, suspend and remove county personnel (unless otherwise provided by state law).

STATEMENT OF THE CASE

Petitioner, William Mineer, was formerly the Fleming County, Kentucky, Road Supervisor. The

named Defendants are as follows: Fleming County; Fleming County Fiscal Court; Jewell Call, Fleming County Judge/Executive; and Fleming County Magistrates, Gary C. Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson, and L.C. Cord.

In 1978, Mineer was recommended for the post of Fleming County Road Supervisor by then Fleming County Judge/Executive, Bill Owens ("Owens") and ratified by the fiscal court. Mineer held this position for two more four year terms upon Owens' recommendation and the then Fiscal Court's ratification. In January of 1986, at the end of Mineer's third four year term, Owens again recommended Mineer for the job. However, the magistrates voted 5 to 1 against his reappointment.

Mineer continued to work as de facto supervisor until September of 1986 when another ballot was taken by the Fiscal Court resulting in a tie vote of 3 to 3 which Judge/Executive Owens broke in Mineer's favor. This was for a two year term to begin retroactively in January of 1986, expiring in January of 1988. In January of 1988, despite Owens' failure to submit his name to the Fiscal Court for approval, Mineer continued to work as road supervisor. In May of 1989 Owens lost the primary election for County Judge/Executive to current Fleming County Judge/Executive, Jewell Call ("Call"). While still in office but after losing the primary, Owens resubmitted Mineer's name to the Fiscal Court for the post of road supervisor. Mineer was reappointed to a four year term, retroactively beginning in January of 1988 and extending to January of 1992.

In September, 1989, Mineer announced that he would run as a write-in candidate for County Judge Executive and took a leave of absence from his County Road Supervisor post to do so.

In November of 1989, Call was elected County Judge/Executive. He took office in January of 1990, as did a newly elected Fiscal Court. In an action taken January 1990, the new Fleming County Fiscal Court voted to nullify the contract they had with Mineer in which he was appointed to a four year term as County Road Supervisor effectively terminating his employment without any notice or hearing in the middle of his four year term.

Mineer then brought a claim pursuant to 42 U.S.C. Sections 1983, 1985, and 1988, alleging that the Fiscal Court and Judge/Executive acted in violation of his First, Fifth, and Fourteenth Amendment rights under the United States Constitution in discharging him from his office and that his removal was politically motivated punishment for the exercise of his constitutional rights.

Following the close of discovery, the Defendants filed a motion for summary judgment as to all claims and asserted the affirmative defense of qualified immunity.

In their motion for summary judgment, the Respondents/Magistrates contended they were entitled to qualified immunity because they acted in good faith and without malicious intent in regard to Mineer. They contended that Mineer had no expectation of continued employment because the former Fiscal Court did not

have authority to appoint him for a term which outlasted its own. They further argued that under Kentucky law, they were without authority to nominate or appoint employees and thus were incapable of misusing that power within the context of 42 U.S.C. 1983, and since it is the County Judge/Executive who has the power to appoint and remove the road supervisor, they, as magistrates, should be entitled to official immunity and granted summary judgment. The Magistrates' final contention was that public policy and tradition support a right of a public official to hire and fire on the basis of party affiliation and that despite this court's holding in *Rutan v Republican Party of Illinois*, 497 U.S. 62 (1990), they should have the authority to terminate employees because of their political differences.

In response, Petitioner argued that the Respondents (Magistrates and County Judge/Executive) incorrectly interpreted Kentucky law and that under the First Amendment he had a right to free speech without fear of reprisal because the position of County Road Supervisor is not policy making. He further responded that the Respondents were not entitled to qualified immunity because the law against terminating employees for politically motivated reasons was firmly established at the time the Respondents terminated him and that the magistrates and county judge/executive violated a clearly established right that reasonable officials should have known was unlawful.

The Respondents then replied raising several new issues. They contended that Mineer had no property interest in his employment and that his due process

rights were not infringed upon because he failed to ask for a hearing after he was terminated.

They also reiterated their defense of qualified immunity arguing that even where there has been a violation of a clearly established right it must be determined whether a reasonable official could reasonably have believed the action taken was lawful. Thus they argued that under the prevailing statutory and case law they had a reasonable basis to believe that Mineer's four year appointment was improper and that they were entitled to qualified immunity because political considerations are appropriate in employment decisions involving policy making personnel.

FEDERAL DISTRICT COURT

The Magistrates Claim for Qualified Immunity

Because the District Court granted summary judgment in favor of the Magistrates as to the First Amendment and State Law Wrongful Discharge claims, they found it unnecessary to rule on the issue of their qualified immunity as to these claims. As to the Magistrates qualified immunity in regard to the due process issue, the District Court found that a jury question existed as to whether the Magistrates should reasonably have known of Mineer's right to a notice and hearing before termination. Since this is a question of which qualified immunity turns, the court declined to return summary judgment to the Magistrates on the due process claim.

Claims Against the County Judge/Executive

As to Mineer's state law causes of action as well as his common law wrongful discharge claim, the District Court denied Judge/Executive Call's qualified immunity relying on the Sixth Circuit case of *Gossman v Allen*, 950 F.2d 338 (6th Cir. 1991), which held that qualified immunity is not an available defense to claims that do not invoke federal law whatsoever. As to Mineer's federal law claims, the District Court held that Judge/Executive Call's defense of qualified immunity turned on whether a reasonable official in Call's shoes would have known that terminating Mineer's employment violated his First, Fifth, and Fourteenth Amendment rights. Holding that these are jury questions, the District Court held that these are matters that cannot be decided on a motion for summary judgment.

INTERLOCUTORY APPEAL TO THE SIXTH CIRCUIT COURT OF APPEALS

Judge/Executive Call and six magistrates appealed the portions of the District Court's opinion which denied them qualified immunity to the Sixth Circuit Court of Appeals as a matter of right pursuant to *Mitchell v Forsythe*, 472 U.S. 511 (1985). After the issues were briefed, the Court of Appeals delivered its first of two extremely confusing opinions and orders.

In the first of the Sixth Circuit's opinions, the Court, per Judge Churchill, arguably reversed the District Court's judgment and granted the magistrates motion for summary judgment in regard to qualified

immunity on the Fourteenth Amendment issue. It further seemed to affirm the denial of the Judge/Executive's motion for summary judgment on qualified immunity.

The confusion stems from a passage in the Sixth Circuit's opinion that reads as follows:

> "James P. Churchill, Senior District Judge, delivered the opinion of the court. Guy, Circuit Judge, delivered a separate opinion, concurring in part and dissenting in part, in which Ryan, Circuit Judge, concurred."

Judge Churchill found that the Magistrates were qualifiedly immune, but Judge/Executive Call was not qualifiedly immune. Judge Guy would grant both the Magistrates and the Judge/Executive qualified immunity. Based on the above passage, the defendants argued that the dissenting opinion of Judge Guy, in which Judge Ryan arguably concurred is actually the majority opinion even though Judge Churchill delivered the opinion of the court. If this was the case, then all three judges concurred that the magistrates were entitled to qualified immunity with respect to both the Fourteenth Amendment Procedural Due Process claim and the First Amendment claim.

However, in his dissent, Judge Guy opined that the County Judge/Executive was entitled to qualified immunity on both the Fourteenth and First Amendment claims. Arguably, Judge Ryan concurred with him. Thus the defendants argued that Judge/Executive Call should have been granted qualified immunity because

two of three judges so agreed in a dissent.

After this, the defendants, by counsel, filed a Motion to Enforce the Mandate of the District Court, which the plaintiff opposed. The District Court, noting that the Sixth Circuit's opinion was "*rather confusing*", held that *Judge Churchill's* opinion was actually the "opinion of the Court", thus holding the magistrates entitled to qualified immunity and that the claims against Defendant Call should be set for trial. However, the District Judge allowed Defendant Call thirty days to take appropriate action to clarify the decision of the Sixth Circuit Court of Appeals.

Defendant Call then filed a Petition for Writ of Mandamus requesting the Court of Appeals to enter an order directing the District Court to act in conformity with the May 4, 1993, opinion of the Sixth Circuit and to dismiss the plaintiff's complaint, with prejudice. In response to the petition, the Court of Appeals, Judges Guy, Ryan, and Churchill sitting, entered a clarifying order on September 3, 1993, directing that Judge Churchill's opinion expressed the majority result with respect to the magistrates, but Judge Guy's opinion, even though written as a dissent, stated the Court's conclusions with respect to Judge/Executive Call. In view of this clarification the Court ordered that the Petition for Writ of Mandamus be dismissed, and that the District Court take all appropriate steps to enforce the Sixth Circuit's opinion as stated above.

This Petition for a Writ of Certiorari to the Supreme Court of the United States followed.

SIXTH CIRCUIT COURT OF APPEALS SUBSTANTIVE REASONING

As for the magistrates claim of qualified immunity, the Sixth Circuit held that according to the applicable Kentucky statutes, the members of the fiscal court did not have the legal capacity to deprive the plaintiff of constitutional rights in connection with his termination and thus concluded that the magistrates were entitled to qualified immunity with respect to the Fourteenth Amendment claim as well as the First Amendment claim.

In regard to County Judge/Executive Call's claim for qualified immunity on the Fourteenth Amendment due process claim, Appellate Judge Guy opined that Kentucky law prohibited a fiscal court from contracting with a road supervisor for employment beyond the fiscal court's term in office. Thus, he concluded that Mineer did not have valid contract extending beyond January, 1990, and therefore, Judge/Executive Call acted reasonably in determining that it was lawful that Mineer did not have a recognizable property interest in his job, and therefore granted Judge/ Executive Call qualified immunity.

With respect to Judge/Executive Call's claim of qualified immunity as a defense to the plaintiff's First Amendment claim, Appellate Judge Guy reviewed the relevant case law on politically motivated personnel decisions including United States Supreme Court cases as well as Sixth Circuit cases. In concluding that the state of the law on that issue was unsettled, he held that

it could not be said that Mineer had a clearly established right as County Road Supervisor to be free from politically motivated dismissal and thus granted Judge/Executive Call qualified immunity on that issue.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The United States Court of Appeals for the Sixth Circuit erroneously made two rulings in regard to Judge/Executive Call's qualified immunity that decides an important question of federal law which has not been, but should be settled.

First, despite this Court's rulings in *Branti v Finkel*, 445 U.S. 507 (1980), *Elrod v Burns*, 427 U.S. 347 (1976), and the Sixth Circuit's ruling in *Christian v Belcher*, 888 F.2d 410 (6th Cir. 1989), the Court of Appeals granted Judge/Executive Call qualified immunity on the rationale that patronage dismissal law was insufficiently developed at the time of Mineer's dismissal making Call's actions objectively reasonable. However, in light of the above cited case, the law *was* clearly established that Call was constitutionally prohibited from dismissing Mineer solely because of his political association and/or expression.

Call candidly admitted in his deposition that since Mineer was supporting the other man he didn't want to keep him on. The law of Sixth Circuit was clearly established that before a County Judge/Executive could terminate ones employment for political reasons, he

would have the burden of demonstrating that political loyalty is essential to the discharge of the persons governmental responsibilities. *Christian*, Supra. Judge Call simply failed to meet this burden and should not have been cloaked with the defense of qualified immunity.

The Sixth Circuit, in the recent case of *Cagel v Gilley*, 957 F.2d 1347 (6th Cir. 1992), held that to find a clearly established constitutional right, a district court within the Sixth Circuit must find binding precedent from the Supreme Court, the Sixth Circuit, or from itself. In the case at hand, the Sixth Circuit Court of Appeals, in *Belcher*, Supra, had already ruled that a County Judge/ Executive could not constitutionally terminate a person in position analogous to Mineer's for purely political reasons. Thus the Sixth Circuit was clearly in error in ruling that Mineer did not have a clearly established right as County Road Supervisor to be free from politically motivated dismissal.

The reason this Court should grant this Petition for Certiorari is that, as Justice Powell wrote in his dissent in *Branti*, Supra, "The standard [for politically based firings] articulated by the court is framed in vague and sweeping language. Elected and appointed officials at all levels no longer will know when political affiliation is an appropriate consideration in filling a position." 445 U.S. at 524. Further, as the Seventh Circuit of Appeals in *Upton v Thompson*, 930 F.2d 1209 (7th Cir. 1991) and a commentator therein noted:

> So after *Branti*, the test is whether party affiliation is appropriate requirement for effective job performance. Jobs requiring party affiliation for effective job performance may or may not be of the policy making or confidential variety. That is, between the strictly menial government worker (who under *Elrod and Branti*, is clearly and completely protected from patronage firing) and the policy maker/confidential assistant (whose protection from patronage firing is nonexistent) there is a range of government positions for which the propriety of patronage firing has depended largely on the court's juggling of competing constitutional and political values. The results have not been consistent.

The failure of the courts to develop and apply a consistent set of principles concerning patronage dismissals creates a context in which [county employees and employers] can have no clear understanding as to whether a plaintiff employee is constitutionally protected from being fired just because of political affiliation. The lack of clarity on the above issue warrants this court's granting of the Petition for Certiorari.

With respect to Mineer's claim that Judge Call's conduct was violative of the due process clause of the Fourteenth Amendment, the Sixth Circuit erroneously concluded that Mineer had no property right to his continued employment. As set forth in the statement of the case, on January 8, 1990, Mineer had two more years to serve on a four year term of employment. This four year term resulted from the former Judge/Executive Owens' nomination of Mineer who filled the post of Road Supervisor in May, 1989, and the fiscal court's ratification

of a four year term retroactively beginning in January, 1988, to extend to January, 1992.

Judge/Executive Call argued for qualified immunity on the basis that it was not clearly established that Mineer's term did not terminate as a matter of law on January, 1990. Primarily he relied upon the case of *Christian v Belcher*, Supra, wherein the Sixth Circuit, interpreting Kentucky law, held that the terms of all county employees expire automatically at the end of each executive administration. *Christian*, 888 F.2d at 414-15. In this case, however, the Sixth Circuit failed to defer to the applicable Kentucky statutes regarding county road supervisors. Specifically K.R.S. 179.020(7) provides an exception to the general principle that all terms expire automatically at the end of each executive administration. The statute provides that the period for employment for any county road supervisor shall be either two or four years to begin on the second Tuesday in January of an even numbered year. There is no requirement that the term begin at the beginning of the term of a magistrate or the beginning of the term of a county judge/executive.

The Judge/Executive relied upon Kentucky Attorney General opinion 78-4302 in support of the general proposition that a fiscal court may not enter into contracts which extend beyond its own term. However, that opinion clearly states that this is not absolute and that if a particular statute confers the power to contract beyond the fiscal court's term, then the statute would govern. K.R.S. 179.020 is such a statute. For the above

reasons, Mineer had a clearly established property right to the final two years of his four year term of employment and because he was deprived of these without the pretermination process as set out in the Kentucky Revised Statutes, the Sixth Circuit Court of Appeals was in error in granting Judge/Executive Call's qualified immunity as to the Fourteenth Amendment due process claim as well as the First Amendment claim.

II. The Sixth Circuit Court of Appeals erroneously granted the members of the fiscal court qualified immunity when they, in conjunction with the Judge/Executive, terminated Mineer in violation of his Fourteenth and First Amendment rights.

The Sixth Circuit through Judge Churchill's opinion, held that the members of the fiscal court did not have the legal capacity to deprive Mineer of constitutional rights by terminating him. He opined that the sole power of removal of county road supervisors was vested in the Judge/Executive and that the fiscal court would not have played a role had Judge/Executive Call followed the statute in removing Mineer.

K.R.S. 179.020 provides that the duties of a county road engineer shall be performed by a county road supervisor who shall be employed by the County Judge/Executive with the consent of the fiscal court and he may be removed in the same manner provided for county road engineers. K.R.S. 179.060 allows a County

Judge/Executive to remove a road supervisor for incompetence, malfeasance or misfeasance after giving written charges and a hearing.

According to its minutes, the fiscal court received Mineer's nomination in 1989 and voted to employ him for a four year term retroactive to the second Tuesday of January, 1988. This resolution was passed by a 5 to 1 vote. Then in January, 1990, after Judge/Executive Call took office, the magistrates of the fiscal court went into executive session in their first meeting under the new judge and then emerged from the meeting adopting a resolution nullifying the contract they had with Bill Mineer. They then immediately adopted another resolution to employ James Watkins as road supervisor to fill the vacancy now left in that post.

The magistrates were acting in their official capacities when they voted for the resolution to nullify the contract between the Fleming County Fiscal Court and County Road Supervisor Bill Mineer. They were also acting in their official capacity when they voted for the resolution to appoint James Watkins to the post. The action of the fiscal court was clearly improper. K.R.S. 179.060 provides how a county road supervisor may be removed. Neither Judge Call nor the magistrates took any steps to follow the statutory procedure for the removal of county road supervisor. Furthermore, the Sixth Circuit Court of Appeals, in a footnote to Judge Churchill's portion of the opinion, recognized in an annotation to the Kentucky removal statute, K.R.S. 179.060, that it had been amended by K.R.S. 67.710(7)

by implication so that the County Judge/ Executive exercises his authority to remove county personnel with the *approval* of the fiscal court. Thus, under Kentucky law, the magistrates did have the capacity to terminate Mineer. In fact, the record shows that they, in conjunction with Judge/Executive Call, did terminate Mineer without cause in violation of his clearly established constitutional rights. For these reasons, the Sixth Circuit was in error when they failed to reverse the District Court's grant of qualified immunity to the magistrates.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted

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